

THE COMMISSION ON UNAUTHORIZED PRACTICE OF LAW

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE THE REVISION OF THE 1990 RULES ON
ON UNAUTHORIZED PRACTICE OF LAW

ORDER

On April 30, 1999, the Montana Supreme Court Commission on the Unauthorized Practice of Law, submitted to this Court proposed amendments to the 1990 Rules on Unauthorized Practice of Law. The proposed amendments, with changes inserted by the Montana Supreme Court are attached.

Accordingly, by and under the authority vested in the Court in Article VII, Section 2(3), of the Constitution of the State of Montana, IT IS HEREBY ORDERED that the Revision to the 1990 Rules on Unauthorized Practice of Law, as attached hereto, are hereby adopted, effective March 20, 2000.

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and mail copies of this Order and attached Rules to:

1. The Code Commissioner and Director of Legal Services for the State of Montana;
2. The Clerks of the District Courts of the State of Montana;
3. The Clerk of the United States District Court of the State of Montana;
4. The Chairman of the Commission on the Unauthorized Practice of Law;
5. The President and Executive Director of the State Bar of Montana with the request that this order be published in the next available issue of *The Montana Lawyer*; and
6. The State Reporter Publishing Company with the request that this Order be published in the *State Reporter*.

Dated this 15th day of February, 2000.

RULE 1 - PURPOSE; JURISDICTION; EFFECTIVE DATE

(a) Statement of Purpose. The public interest requires that in securing professional advice and assistance upon matters affecting one's legal rights, one should have assurance of the competence and integrity of his or her representative and should enjoy freedom of full disclosure under a recognized privilege of confidentiality. To protect this public interest it is deemed necessary to establish guidelines for the investigation of complaints and the procedures to be followed to eliminate the unauthorized practice of law as defined within the laws of the State of Montana.

(b) Jurisdiction. Pursuant to the provisions of Article VII, Section 2, of the Constitution of the State of Montana, the Montana Supreme Court has inherent jurisdiction to prohibit the unauthorized practice of law.

(c) Complaints, testimony and other presentation or arguments submitted to the Commission on Unauthorized Practice of Law, an investigative committee, any member of the commission or of any such committee, and any commission investigator or special counsel, all proceedings and conduct maintained or engaged in, and all testimony and showings with respect to any of said matters shall be confidential except to respondent unless action pursuant to Rule 8 is initiated.

(d) Effective Date. These rules shall become effective on March 20, 2000. Any formal proceeding pending upon adoption of these rules shall be concluded under these rules.

RULE 2 - DEFINITIONS

As used in these Rules, the following terms have the following meanings, unless expressly otherwise provided, or as may result from necessary implications.

(a) Complainant. "Complainant" means the individual or entity alleging that a person or entity has engaged in the unauthorized practice of law.

(b) Commission. "Commission" means the Commission on Unauthorized Practice of Law appointed by the Supreme Court.

(c) Court or Supreme Court. "Court" or "Supreme Court" means the Supreme Court of the State of Montana.

(d) Record. "Record" means the formal parts of the record of proceedings involving the review of allegations of unauthorized practice of law, including the letter of complaint; the respondent's response to the complaint; all notices of hearings; all pleadings, or motions; all exhibits marked and offered in evidence; the transcript of testimony; the findings and recommendations of the boards and committees; all orders imposing sanction.

(e) Respondent. "Respondent" means an individual alleged to have engaged in the unauthorized practice of law.

(f) Rules or These Rules. "Rules" or "These Rules" means Rules One through Eleven hereof.

(g) State. "State" means the State of Montana.

(h) Unauthorized Practice of Law. "Unauthorized Practice of Law" means the practice of law without being first duly qualified, as prohibited by statute, court rule, or case law of the State.

RULE 3 - COMMISSION ON UNAUTHORIZED PRACTICE OF LAW

(a) Membership. The Supreme Court shall appoint a nine (9) member commission to be known as the "Commission on Unauthorized Practice of Law." The Supreme Court shall appoint these members with as much geographical and professional diversity as possible. The nine members shall be composed of:

(1) One chairperson who shall be a resident of the state and either a practicing lawyer or non-lawyer.

(2) Four (4) practicing lawyers who shall be residents of the state and licensed and admitted to practice in the state.

(3) Four (4) non-lawyer members, who shall be residents of the state.

(b) Term. Of the initial members of the Commission appointed by the Supreme Court:

(1) One lawyer member and one non-lawyer member shall be appointed for an initial term ending January 1, 2001.

(2) Two lawyer members and one non-lawyer member shall be appointed for an initial term ending January 1, 2002.

(3) two lawyer members and two non-lawyer members shall be appointed for an initial term ending January 1, 2003.

Subsequent terms of all members shall be for three (3) years. Subsequent members shall be appointed by the Supreme Court. In the event of a vacancy in the Commission, a successor shall appointed by the Supreme Court for the unexpired term of the member whose office vacated. Members of the Commission may terminate their membership at their pleasure, and their membership may be terminated by the Court at its pleasure.

(c) Officers. The Supreme Court shall appoint a Chairperson of the commission. The chairperson shall appoint a vice-chairperson and a Secretary. The chairperson, and in his or her absence the vice-chairperson, shall be responsible for calling and presiding over meetings of the Commission and for certifying to the Supreme Court all recommendations concerning matters which come before the commission.

(d) Quorum. Five (5) members of the commission shall constitute a quorum. All decisions of the Commission must be by majority vote of those present at a meeting at which a quorum is present.

(e) Meetings. Members of the Commission shall meet at times and places designated by the chairperson or, in the absence of the chairperson by the Vice-Chairperson, who shall determine the agenda for meetings. Meetings of the Commission may be held by conference telephone or similar communications equipment or by mail including facsimile mail.

(f) Duties and Powers. The Commission shall have the following powers and duties:

(1) To receive complaints of unauthorized practice of law;

(2) To refer complaints for investigation;

(3) To supervise and be responsible for the investigations;

(4) To review investigative findings relative to complaints of unauthorized practice of law;

(5) To make and submit findings and recommendations, together with the record of the proceedings before it, to the Supreme Court;

(6) To adopt additional rules of procedure subject to approval of the Supreme Court;

(7) To issue cease and desist letters seeking voluntary compliance with unauthorized practice of law statutes, rules and case law;

(8) To take action as authorized by Rule Six (b).

(g) Conflicts. Members of the Commission shall refrain from taking part in any proceedings in which a judge, similarly situated, would be required to abstain. If, in any given case, the number of commission members who may properly render a decision falls below a quorum, the Supreme Court may appoint, for that case only, the number of *ad hoc* members necessary to restore the Commission to full membership. Each *ad hoc* member shall fulfill all the responsibilities of the member whom he or she replaces.

RULE 4 - INVESTIGATIVE COMMITTEES

(a) Appointment. The commission chairperson may, from time to time, appoint commission members to investigative committees to investigate complaints. Each committee shall consist of three members and at least one shall be a lawyer and at least one shall be a non-lawyer. Any procedural rules deemed necessary by the commission for committee operations shall be established by the commission from time to time. Investigative committees shall have the powers and duties hereinafter set forth.

(b) Quorum. A majority of the members shall constitute a quorum of the investigative committee. The investigative committee shall act only with the concurrence of a majority of the members present at a meeting at which a quorum is present. The investigative committee may elect a chairperson from among its members.

(c) Powers and Duties. Investigative committees are investigatory bodies and shall investigate matters that area assigned to them by the Commission. Each investigative committee shall have the following powers and duties:

(1) To take and have transcribed the testimony and evidence of witnesses who may be sworn by any person authorized by law to administer oaths;

(2) To make prompt written report of its investigations and findings to the Commission on Unauthorized Practice of Law;

(3) To submit to the commission its report, together with the record of any proceedings before it.

(e) Compensation and Expenses. Members of an investigative committee shall receive no compensation for their services but may be reimbursed for their travel and other expenses incidental to the performance of their duties under these rules.

RULE 5 - SPECIAL INVESTIGATORS AND SPECIAL COUNSEL

(a) Special Investigators. The commission chair or vice chair may appoint investigators, either lawyers or non-lawyers, to investigate complaints and report to the Commission.

(b) Special Counsel. If, as hereinafter provided, the Commission determines that a formal complaint should be filed to stop or prevent the unauthorized practice of law, the Commission may appoint special counsel for the purpose of preparing and filing such a complaint and conducting the prosecution thereof. Special counsel shall be lawyers who are residents of the State of Montana and who are duly licensed and admitted to practice in the State of Montana.

RULE 6 - INVESTIGATION AND PRELIMINARY PROCEEDINGS

(a) Form of Complaints. All complaints alleging the unauthorized practice of law shall be referred to the commission. All complaints shall be in writing and signed by the complainant.

(b) Notification to Respondent of Complaints. Upon receiving the complaint, the commission chairperson shall immediately notify the respondent in writing of the complaint and attach the written complaint from the complainant. The written notification shall request a response from the respondent. It shall also notify the respondent that he or she may be subject to civil complaint and criminal prosecution for the unauthorized practice of law and the respondent may want to seek advice from a lawyer before responding.

(a) Screening Complaints. All complaints alleging the unauthorized practice of law shall be referred to the commission. If upon preliminary consideration by the commission chair and vice chair, it appears that the facts do not indicate the unauthorized practice of law, the commission may dismiss the matter and so notify the complainant and respondent. If the matter is not dismissed by the commission after preliminary consideration, the commission may take one of the following actions:

(1) Write to the respondent informing the respondent that he or she may be engaging in the unauthorized practice of law and request the respondent cease his or her activity. If the respondent agrees in writing to cease his or her activity, or the commission determines that the respondent is not engaged in the unauthorized practice of law, the commission may dismiss the complaint or hold the complaint in a pending status. The complainant and respondent shall be notified of the commission's action or decision.

(2) Refer the matter for investigation either to an investigative committee or to an investigator. Unless the commission directs otherwise, the respondent shall be notified by the commission that the matter has been referred to an investigative committee or investigator and the respondent shall be afforded an opportunity to be heard by the investigative committee or by the investigator. After completion of investigations, investigative committees or investigators shall submit to the commission a written report. Investigative committees and investigators may, but are not required to, submit with their reports recommendations that formal complaints be filed against respondents or that charges be dismissed. The commission is not bound by such recommendations.

(d) Action by Commission. Upon receipt of the investigative committee's or investigator's findings and recommendations, the Commission shall review the matter on the record before it to determine if there is probable cause to believe the respondent has engaged, or is about to engage, in the unauthorized practice of law. Following receipt of the report, the commission may:

(1) Adopt, modify or reject the findings and recommendations;

(2) Remand the matter to the investigative committee or investigator for further investigation;

(3) Issue a cease and desist letter and/or seek assurance of voluntary compliance from the respondent;

(4) Approve the filing of a civil injunctive proceeding as provided in rule eight (8)(a);

(5) Approve the filing of a civil contempt proceeding as provided in rule eight (8)(b);

(6) Recommend the filing of a criminal contempt proceeding as provided in rule eight (8)(c).

RULE 7 - VOLUNTARY COMPLIANCE

(a) Upon a determination or agreement that the unauthorized practice of law has occurred, the commission may accept an assurance of voluntary compliance that respondent will not continue the unauthorized practice of law. An assurance of voluntary compliance shall be in writing and shall be filed in the official records of the commission.

(b) A violation of such assurance of voluntary compliance shall establish a presumption that the person subject thereto knows, or in the exercise of due care should know, that he or she has violated the law prohibiting the unauthorized practice of law.

(c) In the event the commission accepts an assurance of voluntary compliance that a respondent will not continue the unauthorized practice of law, the commission may continue its investigative and adjudicatory functions under rule eight (8) to conclusion.

RULE 8 - FORMAL PROCEEDINGS

Formal proceedings shall be initiated and processed under the following procedures:

(a) Civil Injunctive Proceedings.

(1) Complaints shall be by written petition filed in the commission's name with the district court in the district in which the respondent resides or maintains his or her principal place of business or where the alleged violation occurred.

(2) Each such petition shall be processed in the district court in accordance with the Montana Rules of Civil Procedure and the laws of the State of Montana.

(3) The commission may request the county attorney in the county where the alleged violation occurred to file and pursue the civil injunctive proceeding.

(4) If the county attorney does not act or is unable to act, the commission may contact the attorney general and request that the attorney general pursue the alleged violation.

(5) The penalty for violation of injunction shall be that provided in § 37-1-318, MCA, corresponding with the statutory regulatory structure for regulated entities within the purview of the Department of Commerce.

(b) Civil Contempt Proceedings.

(1) A civil contempt proceeding for unauthorized practice of law, as provided by § 37-61-210, MCA, or other applicable statute or law, shall be prosecuted in the manner provided by § 3-1-501 et seq., MCA.

(2) The procedure and punishment for a civil contempt shall be provided by § 3-1-501 et seq., MCA.

(3) Nothing set forth herein shall be construed to prohibit or limit the right of the district court to issue a permanent injunction in lieu of or in addition to any punishment imposed for a civil contempt.

(4) The commission may request the county attorney in the county where the alleged violation occurred to file and pursue the civil contempt proceeding.

(5) If the county attorney does not act or is unable to act, the commission may contact the attorney general and request that the attorney general pursue the alleged violation.

(c) Criminal Contempt Proceedings.

(1) If a respondent violates a court-ordered injunction, the commission may request the county attorney in the county where the alleged violation occurred to prosecute the respondent for criminal contempt, pursuant to § 45-7-309, MCA.

(2) Once the Commission has recommended prosecution to the county attorney, the Commission shall take no further action unless the county does not act or is unable to act. In that event, the commission may contact the attorney general and request that the attorney general pursue the alleged violation.

RULE 9 - OATHS, SUBPOENA POWER AND DISCOVERY

(a) Oaths. Any member of the commission and any member of an investigative committee may administer oaths and affirmations in matters pending before the commission.

(b) Subpoenas. The chairperson or vice-chairperson of the Commission may, at the request of an investigative committee or investigator, special counsel, or respondent, compel, by subpoena, the attendance of witnesses and the production of pertinent books, papers, and documents.

Any person subpoenaed to appear and give testimony, or to produce pertinent books, papers or documents, who fails or refuses to appear or to produce such books, papers, or documents, or any person having been sworn to testify, who refuses to answer any proper questions, may upon request of the commission be cited for contempt of the Supreme Court, which proceeding may be brought by the commission in any district court in the State, the Supreme Court hereby granting the jurisdiction to hear such contempt proceedings to the district courts. Proceedings before a district court shall be had as in cases of other contempts. A district court may, upon proper application, enforce the attendance of any witness and the production of any documents subpoenaed.

(c) Quashing Subpoena. Any attack on the validity of a subpoena so issued shall be heard and determined by the chairperson of the commission, subject to review by any district court of the State, the Supreme Court hereby granting to the district courts the jurisdiction to hear such proceedings.

(d) Discovery. Special counsel and respondent shall be afforded reciprocal discovery. Disputes concerning the scope and other aspects of discovery shall be determined by the chairperson of the commission.

RULE 10 - COMMISSION AND STAFF JUDICIAL IMMUNITY

In exercising its functions and powers, the commission, its members, employees and all personnel through whom the commission functions, shall enjoy such judicial immunities as the Montana Supreme Court would enjoy if performing the same functions.

RULE 11 - COMPENSATION AND EXPENSES

(a) Commission and Investigative Committee Members. The members of the Commission and members of an investigative committee shall receive no compensation for their services. Upon approval by the chairperson or the source of the funds and if funds are available, members may be reimbursed for their travel and other expenses reasonably incurred by them in the performance of their duties under these rules.

(b) Investigators and Special Counsel. Upon approval by the chairperson or the source of the funds and if funds are available, investigators and special counsel shall be compensated in such amounts, and shall be entitled to reimbursement for travel and other expenses reasonably incurred by them in the performance of their duties under these rules.

(c) Witness Fees. Witness fees and mileage for witnesses in commission or investigative committee proceedings shall be the same as provided by law for witnesses in civil actions in the district courts of the State of Montana.

*For the **Commission on Unauthorized Practice**, see p. 78 in this Deskbook.*